10814

Case reference	**:**	**LON/OOBE/LSC/2012/0843 and LON/OOBE/LSC/2013/0260**
Property	**:**	**Block B , Flat 604 and Block A, Flats 006 and 507, The Jam Factory, 27 Green Walk, London SE1 4TX**
Applicants	**:**	**Mr S. Bond, Mrs C.Marshall and Mr K. Conway (leaseholders)**
Representative	**:**	**Mr Bond and Mr Conway were represented by Ms K. Helmore of counsel. Mrs Marshall was assisted by Mr R. Green**
Respondent	**:**	**Jam Factory Freehold Ltd (landlord)**
Representative	**:**	**Mr K. Gunaratna of counsel instructed by Ms K. Bright a solicitor with Bishop & Sewell LLP, solicitors.**
Type of application	**:**	**Liability to pay service charges under section 27A of the Landlord and Tenant Act 1985 ('the Act')**
Tribunal member	**:**	**Professor James Driscoll (Tribunal Judge), Mr Mel Cairns and Mr Paul Clabburn**
Date of hearing	**:**	**12 May, 2015**
Date of decision	**:**	**21 May, 2015**

DECISION

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The Decisions Summarised

1. The annual common parts service charge and estate service charge budgets were properly prepared having been based on estimates made by a qualified surveyor as required by the leases.

2. The landlord's professional costs incurred in defending an application for a manager to be appointed are properly recovered as a common parts service charge and not as an estate service charge under the terms of the leases.

3. The reserve funds are properly maintained and there is no evidence that the landlord has wrongfully transferred monies from the common parts or estate management funds to the reserve funds.

4. No order is made under section 20C of the Landlord and Tenant Act 1985 in relation to any costs incurred by the landlord in these proceedings.

5. These were the only issues on which this tribunal has been asked to make determinations and there are no other issues to be determined between them save for a pending application to the Court of Appeal against a decision of the Upper Tribunal that affects these parties.

6. In the case of Mrs Marshall a copy of this decision will be sent to Brent County Court (under claim reference 2YL80174) in connection with her claims against the landlord.

Background

7. In this matter the applicants are leaseholders of flats in a large development. The respondent to the application is the landlord. The previous freeholder became insolvent and (the tribunal was informed) its liquidator offered to dispose of the freehold to the leaseholders and a majority of them accepted the offer. They formed the company called the Jam Factory Freehold Limited which now owns the freehold of most of the development and which is the landlord under the leases.

8. They seek various determinations of service charges. It should be noted that the relevant service charge period is the relevant calendar year.

9. At the hearing which took place on 12 May 2015, we were informed that 98 of the leaseholders became members of the landlord company. A premium of £450,000 was paid for the freehold. The freehold consists of three blocks of flats that is A, B and C. There are 93 flats in Block A, 42 flats in Block B and 59 flats in Block C. Over time the actual number of flats has changed with the merging of some of the flats.

10. This development also includes Block D the freehold of which is separate ownership. We were told that there are 44 flats in Block D. It was also

envisaged that a block E would be built but this part of the development did not take place. As the freehold of Block D is in separate ownership neither the owner nor any of the leaseholders in that block are involved with these applications.

11. One of the directors of the Jam Factory Freehold Limited, Ms Anne Keely told us at the hearing that the memorandum and the articles of association of the company allow any current leaseholder to become a member.

12. The landlord has appointed Stonedale Management Limited as the managing agents for the development.

13. The first applicant is Mr Bond the leaseholder of a flat at Block B Flat 604.

14. Mr Conway has become the second applicant to the application. He is the leaseholder of two flats in Block A numbered 006 and 507.

15. The landlord commenced county court proceedings seeking recovery of unpaid service charge payments (including unpaid demands for contributions to the reserve fund) and unpaid ground rents against the third applicant, Mrs Marshall. By order of the Brentford County Court dated 1 March 2013 all of the service charge elements of the claim (including the contributions to the reserve fund) were transferred to this tribunal to be determined under the provisions in sections 19 to 27A of the Act. Mrs Marshall challenges the service charges for the year 2012.

16. In this application the leaseholders appeared to challenge the payability of service charges for the years 2012, 2013 and 2014. This informed the directions that were given by this tribunal in January 2015 and the basis on which the statements of case were prepared on behalf of the parties and also the basis on which the bundles were prepared.

17. At earlier stages the proceedings related to earlier service charge years (2006, 2007, 2008, 2009, 2010 and 2011). For reasons explained below that element of the dispute has been dealt with.

18. Mrs Marshall is also challenging the charges for 2012 under case number LON/OOBE/LSC/2013/0260. This tribunal decided on 16 January 2015 that for the same reasons that applied to Mr Bond's case that it had no jurisdiction to make determinations for the earlier service charge years. The tribunal rejected the landlord's application for permission to appeal this decision to the Upper Tribunal.

19. There has been a long-standing dispute over the payability of service charges which many of the leaseholders are challenging. Some 14 leaseholders disputed service charges for various periods. On 11 October 2011 the landlord and the leaseholders concerned (who included the applicants and Ms Marshall) signed a compromise agreement (the 'compromise agreement') in relation to the service charges that were in dispute and were being considered by the tribunal in relation to service

charges for the years 2006 to 2011. Those proceedings, as will be seen, are directly relevant to this application. In those proceedings the applicant leaseholders applied for a manager to be appointed under section 24 of the Landlord and Tenant Act 1987. That application failed.

20. Subsequently, Mr Bond challenged later claims for service charges arguing that they were irrecoverable because of the compromise agreement. In a decision given on 7 May 2013 this tribunal decided in his favour and that accordingly the landlord could not claim service charges for the periods covered by the compromise agreement.

21. The landlord appealed to the Upper Tribunal which in a decision dated 7 October 2014 dismissed the appeal and decided that the decision of this tribunal was correct. The landlord's application for permission to appeal that decision was refused as was their application for permission to appeal to the Court of Appeal. The landlord has applied to the Court of Appeal for permission to appeal the decision of the UT.

22. As noted above, the application for a manager to be appointed was dismissed and this tribunal made an order under section 20C of the 1985 Act limiting recovery of the landlord's costs. The landlord appealed the section 20C order and the UT allowed the appeal and ordered that the appropriate order is that the landlord is allowed to recover 90% of its professional costs as a future service charge from the applicant leaseholders.

23. Directions for the hearing of these applications were given on 14 January 2015.

These applications

24. Following directions given by this tribunal in January 2015 the landlords prepared bundles of documents. The bundles consisted of six volumes, four copies were delivered to the tribunal and a seventh volume the day before the hearing. Together the bundles contained 2,880 pages. They included statements of case, copies of specimen leases, copies of previous decisions of this tribunal and those of the UT affecting the premises, copies of service charge demands, accounts, receipts for expenditure and miscellaneous documents. This documentation gave information for the service charge years 2012, 2013 and 2014. At the hearing on 12 May 2015 counsel for the parties told us that the leases for the different flats are for the most part identical. The service charge terms are the same for all of the leases except that the proportions paid differ with the leaseholders of the larger penthouses paying a greater share. There are also differences in the proportions depending which block the flat is in.

25. The hearing which was arranged for 30 April 2015 was postponed at the request of one of the applicants. An application by the landlord for the tribunal to delay proceeding until the outcome of the application for permission to appeal to the Court of Appeal was refused.

The hearing

26. The hearing was scheduled for 12 and 13 May 2015. It started as scheduled on 12 May 2015 when two of the applicants (Mr Bond and Mr Conway) were represented by Ms Helmore of counsel, Mrs Marshall attended with Mr Green who acted as her representative and the landlord was represented by Mr Gunaratna of counsel, his instructing solicitor Ms Bright of Bishop and Sewell LLP solicitors, Ms J. O'Driscoll and Ms Keely two of the directors of the landlord company, Mr Melissa, Mr Lyle and Mr Rankohi all of Stonedale Property Management the appointed managing agents. A Mr Lewis, another of the leaseholders attended as an observer during the afternoon of the 12 May 2015.

27. At the start of the hearing counsel informed us that following discussions they had narrowed down the issues which still divided the parties into four that is (a) had the service charge budgets (that is to say the estimates) been prepared in accordance with the terms of the leases; (b) had the legal costs payable following the decision of the UT (referred to in above) been correctly demanded; (c) should these costs be recovered as a common parts service charge or an estate management charge; and (d) from where did a nil balance in the reserve funds come from?

28. Counsel told us that these were the only determinations that were now needed and that none of the other challenges set out in the applicant's joint statement of case were being pursued. We were also told that our decisions would apply to all service charge periods and demands.

29. Although it appeared from the documentation that just one application had been made by Mr Bond for 2012 and another has been transferred from the court in relation to Mrs Marshall for the same year we were told that the parties were content for us to proceed on the basis that determinations were needed for the years 2012, 2013 and 2014. However, the parties did not want the tribunal to consider the detailed challenges set out in the joint statement of case, which were responded to in the landlord's reply and also set out in the parties comments in the service charge schedules.

30. Our decisions on these four issues, counsel told us, are the only ones that need to be considered. On behalf of Mrs Marshall, Mr Green told us that she agreed with this course of action.

31. (In the event, we heard submissions made on behalf of the applicant leaseholders and the landlord and we also heard argument on whether a section 20C order should be made for these proceedings. The hearing was completed in one day. The tribunal met on 13 May 2015 to consider its decisions).

32. Our attention was then referred to the terms of the leases. We were taken to Mr Bond's lease a copy of which starts on page 91 of the bundle. His flat is in Block B which as noted contains 42 flats. Under paragraph 1 of this lease distinctions are drawn between 'Common Parts Service Charge' (2.61% in his case) and 'Estate Service Charge' percentages (0.45% in his case.) It also refers to an additional service charge for penthouse apartments as 11.34%. (We have also noted that the lease of

Mrs Marshall's flat in Block A carries an obligation to pay a common parts percentage of 1.44% and an estate service charge percentage of 0.56% - see the copy of that lease starting on page 160 of the bundle. Also included is a copy of a lease for 'unit A5/7 Block A' carrying a common parts service charge of 0.96% and an estate management charge of 0.37%).

33. Service charges are also addressed in the ninth schedule to the lease where clause 1.1.2. of that schedule describes the 'common parts services' (broadly speaking the costs of maintaining the block); clause 1.1.3 describes 'common parts additional items' (which include professional and managing agent fees); clause 1.1.4 describes 'common parts annual expenditure' (broadly speaking the costs of providing these services).

34. As to payment, clause 1.3.3 of the ninth schedule to the lease provides that the leaseholder shall pay a provisional sum calculated upon a reasonable estimate by the surveyor of what the annual expenditure is likely to be for the financial year in question by four equal quarterly payments. As noted above, the annual service charge accounting period is the same as the calendar year.

35. Clause 2 of the ninth schedule defines the 'estate service charge' as various works and services to the estate and 'estate additional items' as professional, managing agents and other expenses. 'Estate Annual Expenditure' describes the costs of providing these services (in clause 2.1.4). Payment of the estate service charge is provided for in clause 2.3 . An estimated charge payable by four equal quarterly payments may be sought provided it is based on a reasonable estimate by a surveyor of what the estate annual expenditure is likely to be for the financial year (as noted above defined as the relevant calendar year).

The submissions

36. As to the first of the four issues referred to in paragraph 29 of this decision, Ms Helmore submitted that although a surveyor had been appointed it was far from clear, in her view, what documents the surveyor had when making his estimate of likely expenditure for a particular period whether this was common parts or estate services. To put it another way, the landlord had not obtained a proper estimate by a surveyor. As a result the landlord had not complied with its obligations in the lease and accordingly these charges are not payable.

37. In reply Mr Gunaratna submitted that the landlord had clearly complied with the surveyor requirement. A budget is prepared by the managing agents who then send it to the surveyor to consider whether it is a reasonable estimate of what the service charge expenditure is likely to be for a particular period. This task has been taken on by Mr Ford, MIRCS a partner with Cluttons LLP. We were referred to his report for the 2012 period a copy of which starts at page 2195 of the bundle.

38. We were also referred to emails confirming that Mr Ford has undertaken this task for the years 2013 and 2014. In addition Mr Ford continues to

act in this role and he gave evidence in the 2011 proceedings where there was a challenge to service charges and an application for a manager to be appointed.

39. On the second issue Ms Helmore drew our attention to the decision of the UT on the section 20 C issue (referred to above). The leaseholders are concerned that the whole of the costs have been recovered from the service charge accounts of the leaseholders who were the applicants in that case, not 90% of the sum as decided by the UT.

40. Mr Gunaratna told us that his clients accept that the full amount of the costs has been charged to the accounts. Only 90% should have been so charged to comply with the decision of the UT. He is instructed that adjustments have been made so that the 10% element of the figure is credited to the individual service charge accounts. The over recovery amounted to the sum of £6,384.26 (that is 10% of the costs) and he and his clients estimate that the individual credits to leaseholders service charge accounts is about £30 per leaseholder.

41. On the third issue, Ms Helmore referred us to the UT decision on section 20C costs. Should the landlord who wishes to charge costs to the common parts service charge account or charge it to the estate account? Her interpretation of the UT decision is that if costs are incurred for one of the blocks it should be charged to the common parts service charge account. But where the costs do not relate to a particular block they should be charged to the estate service charge account. As the proceedings seeking the appointment of a manager were made in relation to more than one block they should be charged to the estate service charge account.

42. Mr Gunaratna replied by submitting that the substance of the application for a manager to be appointed was that blocks A, B and C were not properly managed. It is therefore appropriate for the landlord to charge the costs to the common parts service charge accounts for these blocks.

43. Turning to the fourth point Ms Helmore, told us that the applicant leaseholders have concerns over the reserve funds. We were referred to a copy of the compromise agreement and to reference to 'Reserve Fund Deficit' which in paragraph 2 of the agreement the landlord agreed to clear within 14 months and to adhere to the RICS code of management practice. According to her submissions the landlords have reduced the deficit to nil but she questions where the money (some £250,000) came from. Those instructing her are concerned that it has been paid from the common parts service charge account and that a number of leaseholders are in arrears with their service charges.

44. Ms Helmore added that she has been asking for details of the origins of this payment since meeting the landlord's representatives before the hearing started. She added that it is unclear how the landlord or its managing agents deal with receipt of funds from leaseholders and how they differentiate between reserve fund contributions and payments for service charges that have already been spent.

45. In reply, Mr Gunaratna submitted that Ms Helmore and her clients simply misunderstand the meaning of the 'deficit' in the context of an accruals account. It was not actually a debt to any person or organisation but merely an expression of the situation of expected income as opposed to actual income at a point in time' On a proper reading of the definition in the compromise agreement it refers to the difference between what has been demanded from leaseholders and what has actually been paid. When the landlord signed the agreement it agreed (amongst other things) to take steps to reduce the deficit by recovering unpaid charges. This is how the deficit has been reduced and there is no question of the landlord paying funds into the account.

46. He referred us to a letter sent by his instructing solicitors dated 14 January 2013 which, in his opinion, clearly demonstrates that the deficit has been reduced as the landlord has managed to recover arrears or the non-payment of contributions. A special account has been set up with NatWest for service charge contributions with separate funds for service charges and for reserve funds.

47. The annual accounts, in his opinion, show that the funds have been properly managed. Some of the leasehold members of the landlord company give up a good deal of their time to the affairs of the landlord and they are very unhappy with some of the accusations that have been made implying that funds have been spent inappropriately.

48. Ms Helmore told us that she has had clear instructions that the applicant leaseholders do not allege that any service charge monies have been improperly spent.

49. Mr Gunaratna also told us that the reserve funds have been used to fund works that were not anticipated before they became necessary. He gave an example of faulty conditions of the water tanks which required urgent works. This was met out of the reserve funds. On the question of how the contributions are divided between the accounts he submitted that in practical terms, it is impossible for the landlord or the managing agents to immediately assign the payment received into the relevant service charge account. In practice this task is carried out periodically and properly.

Reasons for our decisions

50. In coming to our decisions we remind ourselves that the relevant service charge period is the relevant calendar year. We also remind ourselves of the ways in which service charges can be recovered and on the distinctions to be drawn between the common parts and the estate services and the provision for a reserve fund.

51. We deal first with the issue relating to whether or not the landlord takes steps to obtain an estimate from a surveyor. It is unusual, in our experience for a residential lease to have such a provision. But it is clearly part of the process provided for in the leases when, as is usually the case, the landlord has a right to demand payments in advance for each service charge year. At the end of a particular service charge period the landlord must inform the leaseholders of the money that was spent. In some cases this will result in the landlord having to seek additional payments where more than the interim payments has been spent. In other cases there may be funds left where the actual expenditure is less than was obtained following the receipts after the estimates have been given.

52. The applicant leaseholders accept (as in our view they must) that reports are obtained from Mr Ford a qualified surveyor and a partner with Cluttons LLP. Their complaint is that it is not clear what information Mr Ford had when he approved of the draft estimates prepared by the managing agents.

53. The applicants therefore challenge the recoverability of service charges as they say that the estimates have not been properly prepared and demanded as a result of which they are not payable. If their argument is correct interim service charges cannot be recovered from the leaseholders.

54. We turn to the copy of the 'Review of Service Charge Budget: Year Ending December 2012' prepared by Mr Anthony Ford MRICS, a partner in Cluttons dated 9 December 2011 (starting at page 2195 of the bundle). In paragraph 6.1 of his report, Mr Ford states 'Having reviewed the documentation provided it is my expert opinion that these the Budget prepared for the year ending December 2012 are a reasonable reflection of the expenditure likely to be incurred by the freeholder which should be recoverable from the lessees under the terms of the service charge provisions'.

55. Mr Ford also refers to the evidence he gave in the 2011 proceedings in this tribunal (paragraph 5.5 of his report).

56. The bundles also include two emails sent by Mr Ford to the managing agents (on pages 2190 to 2193) in which he informs the managing agents that he is satisfied that the budgets prepared by them are realistic estimates for the service charge years 2013 and 2014.

57. We conclude that the managing agents and the landlord have adopted an entirely correct way of fulfilling the requirement that estimates must be examined by a surveyor who must in effect certify that they are a reasonable estimate of the likely expenditure for the relevant financial period.

58. It is difficult to understand what concerns the applicants have. An experienced surveyor, who is a partner in a leading firm of chartered surveyors, has examined the estimates and has expressed the conclusion that the estimates are realistic. The applicants have no evidence that Mr Ford's conclusions are incorrect. We do not think it sensible for the landlord and the managing agents to ask Mr Ford to prepare the actual draft budgets. This is clearly a job for the managing agents who are charged with managing the estate. The duplication of effort would in our opinion be both pointless and expensive.

59. Nor do the applicant leaseholders argue that the approved estimates are incorrect or out of line with the actual expenditure. As we mentioned earlier in this decision it is unusual, in our experience, for leases to provide that estimates have to, in effect, be certified by a surveyor. This is an additional protection against being over charged for estimates and one which the landlord has followed quite correctly.

60. For these reasons, we determine that the current practice of instructing surveyors to assess whether estimates are realistic is in full compliance with the lease provisions.

61. Turning to the issue of the correct way of charging fees incurred by the landlords in opposing the application for a manager to be appointed, we found that we did not need to make a determination as those representing the landlord admitted that the whole of the costs, that 100% had been charged. This mistake was referred to in the landlord's statement of case at paragraph 11 (this statement starts on page 3 of the bundle). Mr Gunaratna also confirmed this at the hearing when he told us that the costs charged will be reduced by 10% that is a figure of £6,384.60. This will result in a small credit in the individual service charge accounts for the leaseholders who were parties to those proceedings.

62. The next issue on charging these in accordance with the decision of the UT on the section 20C issue, fees is more substantial. It requires us to interpret the events that occurred when the application was made for a manager to be appointed and to consider and to apply the reasoning of the UT decision on the appeal against the making of an order under section 20C.

63. The history of the litigation was summarised above. In summary, an application had been made under section 27A of the 1985 Act challenging service charges and there was also an application under section 24 of the 1987 Act for a manager to be appointed.

64. This tribunal determined that the application for a manager to be appointed should be dismissed. It also decided that legal costs involved in the litigation are in principle recoverable under the terms of the leases. However, it decided that it was appropriate to make an order under section 20C of the 1985 Act limiting recovery of the landlord's legal costs as a future service charge. As the hearing proved to be protracted the tribunal encouraged the parties to seek an agreement on the service charges and this led to the signing of the compromise agreement.

65. In an appeal made on behalf of the leaseholders it was argued that this tribunal was wrong to determine that costs can in principle be recovered under the leases. The landlords cross-appealed against the making of a section 20C order. The appeal brought by the leaseholders was dismissed as the UT agreed with this tribunal's decision. However, the cross appeal was allowed and the UT substituted a section 20C order that 10% of the costs incurred should be omitted from the landlord's annual expenditure so far as this is applicable to the applicant leaseholders. In other words, so far as the leaseholders involved in those proceedings, 10% of the landlord's legal costs should be deducted from their share of the service charges.

66. The next issue is to which service charge account the charges can be made that is either the common parts or the estate parts expenditure. To put it another way, how should the legal costs be apportioned? This issue was addressed by the UT in the costs appeal where the UT stated at paragraph 46 '..the apportionment required is such as best reflects the subject matter of the expenditure'. It went on to state that where the costs relate to a single building it should be regarded as common parts expenditure; but where it relates to more than one building, it should be treated as an estate charge.

67. Understandably Ms Helmore relied on this to support her submission that the legal costs should be treated as estate and not common parts expenditure. However, we do not agree with her rather literal interpretation. The key point is that the allocation must depend on the subject matter of the expenditure. Here the legal costs were incurred in successfully resisting an application for a manager to be appointed. As we understand the application, and the decision of this tribunal dismissing the application, the applicant leaseholders sought a new manager to be appointed for the whole of the estate which includes Blocks A, B and C. It clearly could not have included Block D which is in separate ownership. The complaints included allegations of poor management and related accusations. As these relate to the repair and the maintenance of the three blocks, it seems to us, as a matter of common sense, that it relates to the management of these blocks and the costs should logically be treated as common parts expenditure. Moreover, leaseholders in Block D contribute to estate costs so raising a consideration of fairness to those residents

68. This brings us to the final issue, that is the reserve fund. It will be recalled that the applicant leaseholders allege that the size of the reserve fund has been increased as the landlord has transferred monies into it

from the service charge account. The landlords submit that this is based on a misunderstanding of the scope of the compromise agreement and the maintenance of all of the funds.

69. We prefer the landlord's submissions on this point for the following reasons. First, as a matter of the correct interpretation of the compromise agreement, the 'reserve fund deficit' means the difference between what would have been recovered if all the leaseholders had paid and what has actually been paid. Second, the landlord agreed to reduce this deficit to nil within 14 months of the date of the agreement. Third, it has been reduced to nil as those advising the landlords have taken steps to recover the arrears from the non-payers. Fourth, as Bishop & Sewell stated in a letter dated 14 January 2013 (with a copy of reserve fund statement), the reserve fund at that date stood at £211,879.24 with an additional payment of £30,000 about to be paid (which would then increase the fund to £241,879.24). This was to be compared with the deficit of £257,830.81 as it stood as at October 2011 (the date of the compromise agreement). The letter added 'As a result of the proactive arrears chasing our client is very close to reaching this target amount. We have been informed by Stonedale that the target will be achieved shortly and by no later than the end of January 2013.' The letter closed by giving the account numbers of the reserve fund and the service charge funds held with NatWest (see page 2695 of the bundle).

70. To summarise, we accept in principle that the allegation that monies in the reserve and service charge funds were not properly used is a matter that we can make a determination of under section 27A of the 1985 Act. Ms Helmore made it clear that her clients were not suggesting that anyone associated with the landlord company had misused funds though they were suspicious of the origins of the reduction of the deficit in the reserve fund. They suspect that it may have been transferred from the service charge account to the reserve fund. However, they were unable to produce any evidence of this. Such evidence as there is shows that the landlords managed to do what they promised to do when they signed the compromise agreement that is to reduce the deficit to nil. They achieved this according to their solicitors by recovering arrears. One alternative would have been to borrow money (which is allowed under the leases) but we do not think that such a course, which would have been expensive, would have been in the best interests of all of the leaseholders. From what we have seen of the available evidence and the submissions , and on the basis of our reading of the RICS 'Service Charge Residential Management Code' and our own professional knowledge and experience we have concluded that the funds were properly managed.

71. Finally, in this context, we were surprised at a late intervention by Mr Conway towards the close of the hearing when he stated that a sum of about £50,000 had been obtained from Mrs Marshall following the sale of one of the two flats she used to own. Mr Conway did not produce any evidence of this. His counsel told us that she had no instructions to address us on this point.

72. The hearing concluded with counsel addressing us on costs. We were told that the only costs issue they wished to raise was section 20 C of the 1985 Act. Ms Helmore said that she recognised that our decision on this point will be influenced by our decisions on the issues raised on the service charges. However, she submitted that the applicants had by bringing these proceedings instigated a considerable disclosure of information which has helped to clarify some of the issues. She urged us to make an order under section 20C limiting recovery of the landlord's legal costs as a future service charge against the applicants.

73. In response, Mr Gunaratna whilst agreeing that the section 20C issues will be resolved in part by our determinations, argued that the only point that the landlord had to concede was on the limitations of the recovery of the legal costs against the leaseholders. He also submitted that we should take account of the fact that the applicant leaseholders had materially changed their case from one where they were making detailed challenges to service charges to making four general challenges the outcome of which would affect all service charges. However, the landlord had no choice but to defend the applications and to comply with the directions and to produce a very full bundle of documents in seven parts with a total of nearly 3,000 pages.

Costs

74. Under section 20C(1) of the 1985 Act we have the power to order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court or a tribunal are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the leaseholder or any other person or persons specified in the application.

75. We are to make such an order that is just and equitable in the circumstances. In reaching our conclusions we found the analysis of the UT helpful but we do not propose to repeat the consideration by the UT of the various authorities cited as a full analysis of these authorities is to be found in its decision. The following factors have informed our decision that it would not be just and equitable to make an order under section 20C limiting recovery by the landlord of its legal costs in the circumstances of this case.

76. First, the landlord has succeeded in its defence of how it manages the development. It conceded one matter relating to small over-charging of its bill for legal costs and did so several weeks before the hearing.

77. Second, the issues raised had a potential effect on the management of the whole of the development owned by the landlord. If the leaseholders had succeeded with their challenge to the way in which the estimates were obtained this could have threatened recovery of interim service charges and the maintenance of reserve funds.

78. Third, whilst Ms Helmore told us during the afternoon of the hearing that her clients were not suggesting that service charge monies were not

being used properly the tone of the leaseholder's joint statement of case and some of their references in the schedule (when the expression 'misallocated' was used) suggested otherwise. The landlord was perfectly entitled to defend any accusations that the service charge and reserve funds were not being used properly.

79. Fourth, as the UT noted one practical effect of making such an order in favour of the applicants (three of the leaseholders) could lead the landlord to recover its legal costs from the other leaseholders - over 100 of them.

80. Fifth, none of the challenges made by the leaseholders in the schedule the parties completed were fully particularised; nor were they given any monetary value. This may have led the landlords to produce such a huge volume of receipts and other papers as they could not be sure of the details of the case they were facing.

81. For these reasons, we do not consider it just and equitable to make an order under section 20C limiting recovery of the landlord's legal costs in these proceedings.

James Driscoll, Mel Cairns and Paul Clabburn

21 May, 2015

Appendix of the relevant legislation

Landlord and Tenant Act 1985

Section 18

(1) In the following provisions of this Act "service charge" means an amount payable by a Tenant of a dwelling as part of or in addition to the rent -
(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements or insurance or the Landlord's costs of management, and
(b) the whole or part of which varies or may vary according to the relevant costs.
(2) The relevant costs are the costs or estimated costs incurred or to be incurred by or on behalf of the Landlord, or a superior Landlord, in connection with the matters for which the service charge is payable.
(3) For this purpose -
(a) "costs" includes overheads, and
costs are relevant costs in relation to a service charge whether they are incurred, or to be incurred, in the period for which the service charge is payable or in an earlier or later period.

Section 19

(1) Relevant costs shall be taken into account in determining the amount of a service charge payable for a period -
(a) only to the extent that they are reasonably incurred, and
(b) where they are incurred on the provisions of services or the carrying out of works, only if the services or works are of a reasonable standard;
and the amount payable shall be limited accordingly.
Where a service charge is payable before the relevant costs are incurred, no greater amount than is reasonable is so payable, and after the relevant costs have been incurred any necessary adjustment shall be made by repayment, reduction or subsequent charges or otherwise.

Section 27A

(1) An application may be made to a Leasehold valuation tribunal for a determination whether a service charge is payable and, if it is, as to -
(a) the person by whom it is payable,
(b) the person to whom it is payable,
(c) the amount which is payable,
(d) the date at or by which it is payable, and
(e) the manner in which it is payable.
(2) Subsection (1) applies whether or not any payment has been made.
(3) An application may also be made to a Leasehold valuation tribunal for a determination whether, if costs were incurred for services, repairs, maintenance, improvements, insurance or management of any specified

description, a service charge would be payable for the costs and, if it would, as to -
(a) the person by whom it would be payable,
(b) the person to whom it would be payable,
(c) the amount which would be payable,
(d) the date at or by which it would be payable, and
(e) the manner in which it would be payable.
(4) No application under subsection (1) or (3) may be made in respect of a matter which -
(a) has been agreed or admitted by the Tenant,
(b) has been, or is to be, referred to arbitration pursuant to a post-dispute arbitration agreement to which the Tenant is a party,
(c) has been the subject of determination by a court, or
(d) has been the subject of determination by an arbitral tribunal pursuant to a post-dispute arbitration agreement.
But the Tenant is not to be taken to have agreed or admitted any matter by reason only of having made any payment.

Section 20B

(1) If any of the relevant costs taken into account in determining the amount of any service charge were incurred more than 18 months before a demand for payment of the service charge is served on the tenant, then (subject to subsection (2)), the tenant shall not be liable to pay so much of the service charge as reflects the costs so incurred.
(2) Subsection (1) shall not apply if, within the period of 18 months beginning with the date when the relevant costs in question were incurred, the tenant was notified in writing that those costs had been incurred and that he would subsequently be required under the terms of his lease to contribute to them by the payment of a service charge.

Section 20C

(1) A tenant may make an application for an order that all or any of the costs incurred, or to be incurred, by the landlord in connection with proceedings before a court, residential property tribunal or leasehold valuation tribunal, or the Upper Tribunal, or in connection with arbitration proceedings, are not to be regarded as relevant costs to be taken into account in determining the amount of any service charge payable by the tenant or any other person or persons specified in the application.

(2) The application shall be made—

(a) in the case of court proceedings, to the court before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to a county court;
(aa) in the case of proceedings before a residential property tribunal, to a leasehold valuation tribunal;
(b) in the case of proceedings before a leasehold valuation tribunal, to the tribunal before which the proceedings are taking place or, if the application is made after the proceedings are concluded, to any leasehold valuation tribunal;
(c) in the case of proceedings before the Upper Tribunal, to the tribunal;

(d) in the case of arbitration proceedings, to the arbitral tribunal or, if the application is made after the proceedings are concluded, to a county court.
The court or tribunal to which the application is made may make such order on the application as it considers just and equitable in the circumstances.

Landlord and Tenant Act 1987

Section 24 Appointment of manager by the court.

(1)
A leasehold valuation tribunal may, on an application for an order under this section, by order (whether interlocutory or final) appoint a manager to carry out in relation to any premises to which this Part applies—
(a)
such functions in connection with the management of the premises, or
(b)
such functions of a receiver,
or both, as the tribunal thinks fit.
(2)
A leasehold valuation tribunal may only make an order under this section in the following circumstances, namely—
(a)
where the tribunal is satisfied—
(i)
that any relevant person either is in breach of any obligation owed by him to the tenant under his tenancy and relating to the management of the premises in question or any part of them or (in the case of an obligation dependent on notice) would be in breach of any such obligation but for the fact that it has not been reasonably practicable for the tenant to give him the appropriate notice, and

. . . . .that it is just and convenient to make the order in all the circumstances of the case;

where the tribunal is satisfied—
(i)
that unreasonable service charges have been made, or are proposed or likely to be made, and
(ii)
that it is just and convenient to make the order in all the circumstances of the case;
(ac)
where the tribunal is satisfied—
(i)
that any relevant person has failed to comply with any relevant provision of a code of practice approved by the Secretary of State under section 87 of the M1Leasehold Reform, Housing and Urban Development Act 1993 (codes of management practice), and
(ii)
that it is just and convenient to make the order in all the circumstances of the case; or]
(b)

where the tribunal is satisfied that other circumstances exist which make it just and convenient for the order to be made.

In this section "relevant person" means a person—
(a)
on whom a notice has been served under section 22, or
(b)
in the case of whom the requirement to serve a notice under that section has been dispensed with by an order under subsection (3) of that section.]

For the purposes of subsection (2)(ab) a service charge shall be taken to be unreasonable—
(a)
if the amount is unreasonable having regard to the items for which it is payable,
(b)
if the items for which it is payable are of an unnecessarily high standard, or
(c)
if the items for which it is payable are of an insufficient standard with the result that additional service charges are or may be incurred.
In that provision and this subsection "service charge" means a service charge within the meaning of section 18(1) of the Landlord and Tenant Act 1985, other than one excluded from that section by section 27 of that Act (rent of dwelling registered and not entered as variable).]
(3)
The premises in respect of which an order is made under this section may, if the tribunal thinks fit, be either more or less extensive than the premises specified in the application on which the order is made.
(4)
An order under this section may make provision with respect to—
(a)
such matters relating to the exercise by the manager of his functions under the order, and
(b)
such incidental or ancillary matters,
as the tribunal thinks fit; and, on any subsequent application made for the purpose by the manager, the tribunal may give him directions with respect to any such matters.
(5)
Without prejudice to the generality of subsection (4), an order under this section may provide—
(a)
for rights and liabilities arising under contracts to which the manager is not a party to become rights and liabilities of the manager;
(b)
for the manager to be entitled to prosecute claims in respect of causes of action (whether contractual or tortious) accruing before or after the date of his appointment;
(c)
for remuneration to be paid to the manager by any relevant person , or by the tenants of the premises in respect of which the order is made or by all or any of those persons;

(d)
for the manager's functions to be exercisable by him (subject to subsection (9)) either during a specified period or without limit of time.
(6)
Any such order may be granted subject to such conditions as the tribunal thinks fit, and in particular its operation may be suspended on terms fixed by the tribunal.
(7)
In a case where an application for an order under this section was preceded by the service of a notice under section 22, the tribunal may, if it thinks fit, make such an order notwithstanding—
(a)
that any period specified in the notice in pursuance of subsection (2)(d) of that section was not a reasonable period, or
(b)
that the notice failed in any other respect to comply with any requirement contained in subsection (2) of that section or in any regulations applying to the notice under section 54(3).
(8)
The Land Charges Act 1972 and the Land Registration Act 1925 shall apply in relation to an order made under this section as they apply in relation to an order appointing a receiver or sequestrator of land.
(9)
A leasehold valuation tribunal may, on the application of any person interested, vary or discharge (whether conditionally or unconditionally) an order made under this section; and if the order has been protected by an entry registered under the Land Charges Act 1972 or the Land Registration Act 1925, The tribunal] may by order direct that the entry shall be cancelled.

the court shall not vary or discharge an order under subsection (9) on the application of any relevant person unless it is satisfied—
(a)
that the variation or discharge of the order will not result in a recurrence of the circumstances which led to the order being made, and
(b)
that it is just and convenient in all the circumstances of the case to vary or discharge the order.
(10)
An order made under this section shall not be discharged by a leasehold valuation tribunal by reason only that, by virtue of section 21(3), the premises in respect of which the order was made have ceased to be premises to which this Part applies.
(11)
References in this to the management of any premises include references to the repair, maintenance or insurance of those premises.